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In The

Supreme Court of the United States

October Term, 1993

COUNTY OF SAN DIEGO AND THE BOARD OF SUPERVISORS FOR THE COUNTY OF SAN DIEGO,

Petitioners,

v.

JOHN MURPHY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Pullman* abstention is required when a federal court considers a claim arising under a state constitutional provision that has been interpreted by state courts in analogous, but not identical, factual contexts.

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Respondent John Murphy submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Defendants/petitioners, the County of San Diego and the members of its Board of Supervisors, seek a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit affirming the district

court's grant of summary judgment to plaintiff/respondent. Respondent's suit challenges, as a violation of the constitutions of the State of California and the United States, petitioners' use of public park land and funds to display a large Latin cross at the summit of Mount Helix, a prominent County landmark. The decision below rests exclusively on state constitutional grounds.

I. Factual Background

Since 1929, the County of San Diego has owned and maintained a public park located atop Mount Helix, with a thirty-six foot Latin cross standing at the summit. Mount Helix is "[o]ne of the highest hills in San Diego," and the cross at the top "is visible from a substantial distance." Appendix to Petition for Writ of Certiorari (hereafter "App."), at 10. The County acquired the park by a deed that requires the County to maintain the cross, allows no other monuments in the park, and requires that "annually, on each and every Easter Sunday forever, religious services of a strictly non-sectarian character and appropriately suitable for commemorating the resurrection of the Lord Jesus Christ, as taught by the Christian churches of the world, shall be held at Sunrise" on park grounds. App. 10.

The deed also establishes a trust fund designating the County of San Diego as trustee and requiring that a contribution be made annually from the fund for the expenses of the Easter services. App. 11. The trust fund is administered by County employees, but no reimbursement is made from the trust fund for the portion of their salaries representing work on its behalf. App. 51 n.9.

The deed also manifests the deeply sectarian purposes of the grantor. In addition to the provision requiring annual Easter sunrise services "as taught by the Christian churches of the world," the deed recites that the grantor preserved the property to render it suitable for religious purposes, and requires that "[t]he Cross- . . . shall be lighted" during certain periods, including Christmas evening and all night before Easter sunrise. App. 52 n.10.

After respondent filed suit, the County of San Diego designated a portion of the Mount Helix park, including the cross, as an historical monument. As the Court of Appeals noted, however, "the County provides no historically significant facts independent of the cross' inherently religious nature. Indeed, it appears the most historically significant aspect of the cross is its longstanding use as the site of annual Easter services." App. 24.

II. Proceedings Below

The district court granted respondent's motion for summary judgment based on its determination that the Mount Helix cross violated the No Preference Clause of the California Constitution, which guarantees the "free exercise and enjoyment of religion without discrimination or preference. . . . " Cal. Const., art. I, § 4; App. 90. In view of that ruling, the court declined to reach respondent's remaining federal constitutional claim, or claims based on other provisions of the California Constitution. App. 60-61.

The Court of Appeals for the Ninth Circuit affirmed on state constitutional grounds alone. App. 25, 31. The court carefully considered and rejected petitioners' contention, based on the doctrine set forth in *Texas Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), that adjudication of respondent's claim under the No Preference Clause was an abuse of discretion. App. 14-15.

SUMMARY OF ARGUMENT

As the sole ground for issuance of a writ, petitioners assert that the Court of Appeals erred in permitting the district court to decide respondent's state constitutional claim. This asserted basis for review fails to satisfy the standards for exercise of the Court's discretionary jurisdiction, and is premised on an untenable construction of the *Pullman* abstention doctrine.

1. In affirming the district court's decision to adjudicate respondent's claim, the Court of Appeals applied the settled rule that federal courts need not abstain under *Pullman* if they can predict with any confidence how a state court would resolve the matter. In view of the extensive body of California case law construing the No Preference Clause (including a previous challenge to a Latin cross on public property), the Court of Appeals appropriately determined that abstention was not required. The court's reasoning is consistent with the uniform body of case authority interpreting the *Pullman* doctrine, and thus presents no conflict with other circuits that might justify this Court's review.

2. The Court of Appeals correctly distinguished the ruling in *Reetz v. Bozanich*, 397 U.S. 82 (1970), which petitioners claim is in conflict with the holding below. Abstention was appropriate in *Reetz* because the relevant provision had never been interpreted by a state court, and addressed a unique subject with which the federal courts had no experience – fishing rights under the Alaska Constitution. Conversely, the No Preference Clause has been interpreted repeatedly, on analogous facts, and is closely related to the federal Establishment Clause, with which the federal courts have considerable experience. Accordingly, no conflict exists between the decision of the Court of Appeals and any decision of this Court.

REASONS FOR DENYING THE PETITION

I. California Case Law Provides An Ample Basis For Adjudicating Respondent's State Constitutional Claim

The *Pullman* doctrine counsels federal courts to abstain from deciding unclear questions of state law if an alternative construction will render unnecessary, or substantially affect, the ultimate resolution of a federal constitutional question. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). The doctrine has no relevance here, where the district court applied settled case authority.

A. Principles Of *Pullman* Abstention

"The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). "When such exceptional circumstances are not present, denial of [jurisdiction] . . . by the federal courts *merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state*, would thwart the purpose of the jurisdictional act." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234-35 (1943) (emphasis added); *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974) ("the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit").

Specifically, a question of state law "is not 'doubtful' or 'uncertain' just because it turns on the facts of the particular case. Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with *any* confidence how the state's highest court would decide" an issue. *Pearl Investment Co. v. City and County of San Francisco*, 774 F.2d 1460, 1463-65 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (emphasis added).

B. The Decision In *Fox v. City Of Los Angeles* Is Squarely On Point And Precludes Abstention

In *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663 (Cal. 1978), the California Supreme Court considered a challenge under California's No Preference Clause to the City of Los Angeles' practice of "illuminating on the city hall . . . a huge cross – at first to honor the Christmas holidays and then also . . . to honor Easter Sundays, both Latin and Eastern Orthodox." *Id.* at 794. The court observed that the case was "marked by the location, size, and visibility of the Los Angeles cross," as well as the fact that no other religious symbol had ever been placed on the building. *Id.* at 795, 797. Given these considerations, the California Supreme Court ruled that the cross violated the No Preference Clause.

As the Court of Appeals noted, nearly every one of the factors identified in *Fox* is present in the instant case: the Mount Helix cross is 36 feet tall, prominently situated atop one of the highest hills in the San Diego area, and located in a park which, by deed restriction, may contain no other religious monument. App. 18, 22-25. *Fox* thus provides sufficient grounds to determine with confidence how a state court would rule on respondent's claim. Accordingly, the district court was obliged to exercise its jurisdiction and resolve the state constitutional question. *County of Allegheny v. Frank Mashuda Co., supra*, 360 U.S. at 188-89.

Petitioners' attempt to distinguish *Fox* is unavailing. Three purported distinctions are cited: first, that the *Fox* cross was "huge" while the instant cross is merely "large"; second, that the *Fox* cross was affixed to city hall,

while the instant cross is some distance from a public building; and third, that the *Fox* cross was erected with a religious motivation, while the instant cross was erected "as a personal memorial." Petition at 12-13. With respect to the first distinction, the difference between a "large" cross and a "huge" cross – both of which can be seen for miles[1] – is hardly of constitutional dimension. As to the second, petitioners argue that "a reasonable observer would not associate the location of the Mount Helix cross with government," unlike the cross in *Fox*. But a "reasonable observer" would have considerable difficulty dissociating the highest hilltop in the region, which is home to a well-known public park and nature theatre, from the government that owns it. Finally, the third distinction is false: the religious motivation of the Mount Helix cross is amply demonstrated by the deed restrictions accompanying its transfer to petitioners, as the courts below observed. App. 23-24; 69-70.

Petitioners' effort to distinguish *Fox* fails on a more fundamental level as well. If, as petitioners suggest, abstention is required whenever state law precedent fails to correspond, fact-for-fact, with a pending dispute, federal courts would lose jurisdiction over most state law

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[1] Petitioners assert that the Court of Appeals erred in stating that the Mount Helix cross is "visible from a substantial distance" (App. 10), when in fact it is "only visible from the town of La Mesa and its vicinity." Petition at 13. The town of La Mesa, however, stretches approximately two to three miles away from the cross. If two miles is not a "substantial distance," the distinction makes no difference: the cross indisputably occupies a "commanding skyline presence" over the City of La Mesa, and can be seen by thousands. App. 71.

claims. The issue of "uncertainty" under *Pullman* does not turn on distinctions between "large" crosses and "huge" ones, however, or between crosses on city halls and crosses on towering hilltops. If it did, the "narrow exception" would swallow the jurisdiction it was created to qualify. To the contrary, a question of state law "is not 'doubtful' . . . just because it turns on the facts of the particular case. Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with *any* confidence how the state's highest court would decide" the issue. *Pearl Investment Co. v. City and County of San Francisco, supra,* 774 F.2d at 1463-65 (emphasis added). *Fox* provided the district court with ample grounds to make that judgment, and the Court of Appeals correctly affirmed.

C. Additional Decisions Provide Clear Guidance For The Adjudication Of Respondent's State Law Claim

In addition to *Fox,* two other decisions construing the No Preference Clause were relied upon by the courts below. Each provides important additional guidance for the interpretation of the No Preference Clause.

In *Okrand v. City of Los Angeles,* 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (Cal.Ct.App. 1989), the court upheld the display of a menorah in the rotunda of Los Angeles City Hall. Petitioners dismiss the case as "not helpful," asserting that its "situation is dissimilar from the existence of a cross on a hill. *Okrand* relies on a context-

specific approach and thus is of no guidance" in resolving respondent's claim.[2] Petition at 14.

Needless to say, a case need not share identical facts to shed light on the analysis of a related dispute – even if that analysis is "context-specific." In fact, *Okrand* provides an important explication of the principles underlying Fox's "no preference" analysis. 207 Cal. App. 3d at 578-80; *see* note 2, *supra*. Of particular interest is the court's discussion of the religious significance of the Latin cross, as well as the analytic import of the city's inclusion of other religious symbols in the challenged display. *Id.* at 579-80. Both considerations directly affected the analysis of the courts below. App. 67-74; 19-20.

The decision of the Ninth Circuit in *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992), offers further guidance. In *Hewitt*, the Ninth Circuit ruled that a public park containing religious statuary

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[2] Petitioners make this claim despite the fact that the *Okrand* court based its decision, in part, on a comparison between the religious significance of the menorah and the Latin cross. The court noted that the "menorah . . . differs in degree from the Latin cross in terms of its significance as a symbol of religion. The cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity. The menorah's significance to Judaism, on the other hand, is much less direct." *Id.* at 579-80. *Okrand* also reiterated *Fox's* holding that "the city's failure or inability to recognize the symbols or holidays of other religions showed a clear act of preference." *Id.* at 579. Petitioners' characterization of this analysis as "not helpful" to the instant dispute is difficult to grasp.

depicting the life of Jesus Christ violated the No Preference Clause, based on the teachings of *Okrand* and *Fox*. As expected, petitioners dismiss *Hewitt* as "highly fact specific, and thus of no assistance in this case." Petition at 15. As set forth in the opinions of the courts below, however, the *Hewitt* decision addressed important aspects of the "no preference" analysis relating directly to respondent's claim.[3] App. 64-66; 19-20.

Fox, *Okrand*, and *Hewitt* set forth in considerable detail the appropriate analysis of claims arising under the No Preference Clause of the California Constitution. In view of these authorities, any decision to abstain from adjudicating respondent's state constitutional claim would have amounted to an impermissible "[a]bdication of the obligation" to exercise federal jurisdiction. *County of Allegheny v. Frank Mashuda Co.*, *supra*, 360 U.S. at 188.

II. The Decision Of The Court Of Appeals Does Not Conflict With *Reetz v. Bozanich*

Petitioners also assert that the decision of the Court of Appeals conflicts with the holding of this Court in *Reetz v. Bozanich*, *supra*, 397 U.S. 82. The claim is baseless. *Reetz* involved a unique state constitutional provision that had never been interpreted by a state court, and that bears no relation to any federal constitutional provision.

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[3] As in the instant case, the *Hewitt* court weighed the significance of a "deed requir[ing] that the statuary not be altered," as well as the statuary's "dominance of the landscape," in concluding that the statues "are more symbols of worship than museum pieces." 940 F.2d at 1568. Its analysis of these factors informed the decisions of the courts below. *See* App. 65 n.24.

This dispute conversely involves a provision that has been repeatedly interpreted by state courts, and that relates closely to the federal Establishment Clause. The decision of the courts below to adjudicate respondent's No Preference Clause claim accordingly creates no conflict with the unrelated abstention analysis in *Reetz v. Bozanich*.

At issue in *Reetz* were provisions of the Alaska state constitution addressing fishing rights. 397 U.S. at 84. The provisions had never been interpreted by an Alaska court. *Id.* at 85-86. The Court noted that "the constitutional provisions relate to fish resources, an asset unique in its abundance in Alaska." *Id.* at 87. In view of these unusual circumstances, the Court determined that "the first judicial application of these constitutional provisions should properly be by an Alaska court." *Id.* (emphasis added).

Conversely, the religion clauses of the California Constitution have been construed by state courts for over one hundred years (*see, e.g., Ex parte Newman*, 9 Cal. 502, 506-07 (Cal. 1858)), and the No Preference Clause has been applied repeatedly in cases such as *Fox* and *Okrand*. As the preceding discussion makes plain, there is no dearth of state authority construing the constitutional provision at issue here. *Supra*, pp. 7-11.

This case differs from *Reetz* in another important respect. The federal Constitution contains no provision remotely resembling the state constitutional rights addressed in *Reetz*, and federal courts bring no special expertise to the issue. Conversely, California's No Preference Clause is closely related to the federal Establishment

Clause, even though it is "unique" in the sense that its language is different and its protections more expansive. *Okrand, supra,* 207 Cal. App. 3d at 571. Thus, as the court in *Okrand* observed, federal Establishment Clause cases may serve as "compelling guides" in construing the religion clauses of the California Constitution. 207 Cal. App. 3d at 571-72; *see also Hewitt v. Joyner, supra,* 940 F.2d at 1567. Indeed, both *Fox* and *Okrand* cite federal cases in support of their analysis of the No Preference Clause. *Okrand,* 207 Cal. App. 3d at 579; *Fox,* 22 Cal. 3d at 798-99. Petitioners do the same. Petition at 12.

For this reason, federal courts are far better equipped to address questions arising under the No Preference Clause than questions arising under Alaska's constitutional fishing provisions. The *Reetz* abstention analysis is inapposite on this basis as well.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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